

APPEAL NO. 960139
FILED MARCH 1, 1996

Following a contested case hearing (CCH) held on December 4, 1995, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer resolved the sole disputed issue by finding that the respondent (claimant) "has been unable to obtain or [sic] retain employment at wages equivalent to his preinjury wages since June 10, 1995, due to his compensable injury of _____," and by concluding that claimant "re-established disability as of June 10, 1995." The decision states that claimant "re-established disability effective June 10, 1995, and continuing through the date of the [CCH]." The appellant (carrier) challenges the finding and conclusion on bare assertions of "no evidence" and "insufficient evidence" with no articulation of the evidence. The carrier similarly challenges a finding that claimant suffered an injury on _____, when he was struck by a winch line and fell through the substructure of one of the employer's drilling rigs. No response was filed by the claimant.

DECISION

Affirmed.

The parties entered into three stipulations none of which were reflected in the hearing officer's decision. The decision also failed to reflect that the hearing officer admitted as Hearing Officer's Exhibit No. 2 an Appeals Panel decision in an earlier case involving these parties, and this exhibit did not accompany the record. Since neither party has complained of these discrepancies in the decision, we need not further address them. We further observe that claimant was a soft spoken witness and was only once reminded to speak up for the tape recorder. The difficulty in hearing his testimony nearly necessitated a remand for reconstruction of his testimony.

Recounting the history of this disputed issue will, we believe, aid in understanding our resolution of this appeal and permit a somewhat abbreviated decision. Following an earlier CCH held on May 31, 1995, this hearing officer, in a Decision and Order (docket number) issued on June 9, 1995, found among other things that claimant suffered an injury on _____, when he was struck by a winch line and fell through the substructure of one of his employer's drilling rigs, that he aggravated the injury to his low back which occurred on (date of first injury), that he suffered a new injury to his cervical spine and shoulders on _____, that his inability to obtain or retain employment at his preinjury wage equivalent has been solely due to the injury of _____, and not the injury of (date of first injury), and that claimant was unable to obtain or retain employment at his preinjury wage equivalent from June 3, 1994, to December 22, 1994.

Based on these findings, the hearing officer concluded, in part, that claimant suffered a new injury on _____, that claimant's injury of _____, included an injury to the shoulders and neck as well as to the lumbar spine, and that claimant's disability started on June 3, 1994, and ended on December 22, 1994. This decision did not indicate the evidentiary

basis for starting disability on June 3rd nor for ending it on December 22, 1994. The carrier had contended that claimant failed to prove he sustained a new injury in December 1993 and that he had disability resulting from that injury.

In Texas Workers' Compensation Commission (Commission) Appeal No. 951245 (Unpublished), decided September 13, 1995, the Appeals Panel, after a detailed recitation of the pertinent evidence, affirmed an evidentiary challenge to the dispositive findings and conclusions, though characterizing the evidence as "minimal," and noted that the evidence might well have supported an outcome favorable to the carrier. This opinion indicates that claimant saw his treating doctor, Dr. G, on June 3, 1994, and that Dr. G then believed that claimant was not going to be able to work any longer, that there had been no improvement in claimant's back, and that claimant's having continued to work had contributed to this. This opinion also states that the Commission-selected designated doctor, Dr. W, certified to maximum medical improvement (MMI) as of December 22, 1994, with a nine percent impairment rating (IR) for claimant's (date of first injury), back injury. This opinion also noted claimant's testimony that he stopped working on June 5, 1994, and Dr. G's June 3, 1994, notations supporting claimant's decision to stop working, and the Appeals Panel did not find the evidence of disability from June 3 to December 22, 1994, so against the great weight of the evidence as to be manifestly unjust. Apparently, the hearing officer simply ended that period of disability on the MMI date of December 22, 1994, found by Dr. W. notwithstanding that reaching MMI and the end of disability are different concepts entirely.

During the CCH which is the subject of this appeal, the carrier's attorney indicated that the carrier has sought judicial review of our earlier decision, and we surmise that may account for the carrier's challenging the finding that claimant suffered an injury on (date of first injury), a finding previously made and affirmed in Appeal No. 951245, *supra*. In any event, based on the doctrine of *res judicata*, we will not revisit that finding. Since the only other appealed issue not previously resolved is the hearing officer's determination that claimant has had disability from his _____, injury since June 10, 1995, we will limit our discussion of the evidence to that issue. As noted, our decision in Appeal No. 951245, *supra*, contains a detailed recitation of the evidence.

According to a Benefit Review Conference (BRC) report of October 16, 1995, a benefit review officer (BRO) mediated the sole disputed issue, namely, whether claimant had disability as a result of his compensable injury of _____, and if so for what period. Claimant's position at that proceeding was that he had had such disability since January 20, 1995, and that temporary income benefits should be initiated as of that date. The carrier's position was that there was insufficient medical evidence to support claimant's request. The BRO recommended that claimant had disability as a result of his compensable injury of _____, effective August 14, 1995, based on an off-work slip from Dr. G dated August 14, 1995.

At the CCH, Claimant testified that he continued to work after his _____, injury at his preinjury wages until sometime in June 1994 (June 5th according to Appeal No.

951245, *supra*); that although he had received treatment for his low back injury, it was not until sometime in June 1994 that the carrier authorized treatment for his neck; that much of the work he did after his injuries and before he stopped working was heavy and not light duty and he felt he should not have been working; and that Dr. G also felt that he should not have been doing the work he was doing and eventually took him off work altogether. Claimant further testified that his neck pain was not only persistent since his _____, injury but became progressively worse and that he also has limited cervical range of motion (ROM); that he takes muscle relaxers, pain and anti-inflammatory medications; that the only type of work he has done since being discharged from the U.S. Army has been roughneck work in the oil fields and some pipeline work; and that his neck pain and limited ROM have prevented him and continue to prevent him from performing this type of work, which is all he knows.

Dr. G's record of July 18, 1995, states that claimant's neck has never been treated and is of concern and that claimant's problems in the upper thoracic region and low cervical spine were not previously addressed. In his report of October 27, 1995, Dr. G indicated that claimant's neck has now been evaluated and is being treated, that he prescribed some home equipment for claimant, and that claimant's scapulothoracic discomfort and ROM are improving. Dr. G further reported that claimant "has been incapacitated" with neck and back problems since 1993 secondary to pain and discomfort in his back and neck; that claimant "was unable to work any longer and had to stop work in June of 1994"; and that claimant had trouble from this accident prior to that time. Dr. G further stated: "The only thing of significance with this off work slip, signed 8/14/95, was the fact that it was signed 8/14/95 and has nothing to do with the date at which this patient could no longer work. So, the signature is over a date of signature and not referring to a date of disability."

A functional capacity evaluation report of May 10, 1994, stated that claimant did not qualify for the heavy-work level of a derrick hand but did qualify for a medium-work level. The report also stated that claimant was presently working and that his job duties should be analyzed "to ensure that his job responsibilities do not exceed his physical capabilities."

The carrier has not challenged findings that the Commission has previously ruled that claimant injured his neck as well as his low back in the incident of _____, that the issue of disability for the period from December 22, 1993, through June 9, 1995, was "litigated" in the prior hearing, and that claimant's treating doctor "never released him to return to work for the neck and back injuries."

Disability is defined in the 1989 Act as "the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Section 401.011(16). The Appeals Panel has stated with respect to disability that it is possible for an injured employee to go in and out of disability (Texas Workers' Compensation Commission Appeal No. 92257, decided August 3, 1992; Texas Workers' Compensation Commission Appeal No. 92506, decided November 6, 1992),

that pain can be considered to the extent that it prevents the performance of work (Texas Workers' Compensation Commission Appeal No. 91024, decided October 23, 1991), and that the 1989 Act does not "impose on an injured employee the requirement to engage in new employment while still suffering some lingering effects of his injury unless such employment is reasonably available and fully compatible with his training, experience and qualifications" (Texas Workers' Compensation Commission Appeal No. 91045, decided November 21, 1991). However, the latter decision went on to state that the Appeals Panel does not believe the 1989 Act "is intended to be a shield for an employee to continue receiving temporary income benefits where, taking into account all the effects of his injury, he is capable of employment but chooses not to avail himself of reasonable opportunities or, where necessary, a bona fide offer."

Claimant testified that he felt his pain and limited cervical ROM prevented his returning to oil field work. However, in Texas Workers' Compensation Commission Appeal No. 92083, decided April 16, 1992, the Appeals Panel considered findings that the employee was "not capable of working in the oil field on the basis of his elbow injury" as not sufficing to meet the requirements for disability in that disability "is not premised on the inability to obtain and retain employment in the type of work the employee was doing when injured, but it is the inability to obtain and retain 'employment' at wages equivalent to the preinjury wage because of a compensable injury." That decision also said that "[o]bjective medical findings are not a prerequisite to a determination of disability. [Citation omitted.]". Cf. Texas Workers' Compensation Commission Appeal No. 93707, decided September 17, 1993. Claimant testified that he "pays the price" when he physically exerts himself.

In Texas Workers' Compensation Commission Appeal No. 951064, decided August 7, 1995, the Appeals Panel stated: "It is self evident that a determination of the precise commencement and termination dates for periods of disability is necessary since income benefits are paid weekly as and when they accrue. Section. 408.081. The Appeals Panel has said that disability must be established or refuted with some degree of specificity as to the beginning and end dates of disability. Texas Workers' Compensation Commission Appeal No. 941754, decided February 9, 1995." It appears that in his first decision, the hearing officer ended disability on December 22, 1994, the apparent date of MMI for the _____, injury, and that in his second decision the hearing officer determined that disability had been "litigated" for the period from December 22, 1994, through June 9, 1995, because his decision was issued on June 9, 1995, following the May 31, 1995, CCH. We thus surmise that based on the latter unchallenged finding, the hearing officer started the current period of disability on June 10, 1995. As noted, claimant apparently contended at the BRC that another period of disability began on January 20, 1995, while the BRO recommended it began on August 14, 1995, based on an off-work slip. In any event, claimant has not appealed from the hearing officer's not starting the second period of disability until June 10, 1995.

Though certainly problematic, we do not find the challenged finding and conclusion starting another period of disability on June 10, 1995, to be, as the carrier

asserts, both totally without support in the evidence and so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Atlantic Mutual Insurance Co. v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). Not only did claimant's testimony indicate that his neck pain and limited ROM from his _____, injury lead to his stopping work in June 1994 and keep him from working thereafter and up to the date of the most recent hearing, but Dr. G, according to his October 27, 1995, note, felt claimant had been "incapacitated" since 1993 and supported claimant's stopping work in June 1994. We again note that claimant did not challenge the finding that disability was "litigated" at the earlier hearing up to June 9, 1995, and the carrier did not challenge the finding that Dr. G never returned claimant to work. That another fact finder may well have drawn different inferences from the evidence does not afford us a basis to reverse the decision.

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Thomas A. Knapp
Appeals Judge